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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RONALD LEE JOHNSON, Debtor.	BAP No. WO-99-051
RONALD LEE JOHNSON, Appellants, v. LYLE R. NELSON, Trustee, Appellees.	Bankr. No. 98-11961 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before PEARSON, BOULDEN, and MATHESON, Bankruptcy Judges.

MATHESON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* FED. R. BANKR. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

This Court has before it for review the order of the bankruptcy court approving a trustee's agreement to settle litigation in which the bankruptcy estate

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

was involved. For the reasons set forth below, we affirm the order of the bankruptcy court.

BACKGROUND

Prior to the filing of his bankruptcy case the debtor had commenced a lawsuit against The Black Chronicle, a newspaper in Oklahoma City (Newspaper), and others (Lawsuit). The details of that litigation do not appear in the record of these proceedings, but are set forth in *Johnson v. Black Chron., Inc.*, 964 P.2d 924 (Okla. Ct. App. 1998). That decision reports that the debtor sued the Newspaper and other individual defendants, claiming that he had been slandered by reports published in the paper to the effect that the debtor, who was then the executive director of the Oklahoma Human Rights Commission, had, among other things, faced a sexual harassment complaint from an agency employee. The lower state court had entered an order granting the defendants' motion for summary judgment. During the pendency of the debtor's bankruptcy case, the appellate court entered its decision reversing the trial court's order and remanding the case for further proceedings.

The *Johnson* court analyzed Oklahoma law as it pertained to defamation actions. It noted that because Johnson was a public figure, he could only prevail by showing, by clear and convincing evidence, that a false statement had been published and that the publication had been made with "actual malice" with "knowledge that it was false or with reckless disregard of whether or not it was false." *Johnson*, 964 P.2d at 928. The appellate court reversed the grant of summary judgment because of a lingering question of whether there were disputed issues of material fact. The court analyzed the issue as follows:

> The Newspaper asserts it is entitled to summary judgment because Johnson failed to offer any evidence of actual malice. Ordinarily the burden of proving actual malice is upon the official who complains

> of defamation. However, on a motion by a defendant for summary judgment in a libel action, the defendant has the burden of showing there is no issue of actual malice in the case.

Id. at 928.

In opposition to the Newspaper's motion for summary judgment the debtor had filed an affidavit of an Oklahoma assistant attorney general. In that affidavit the attorney stated that he had spoken to a man identified as Harold Roberts who said he was with the Newspaper and wanted some information about the debtor. The affidavit stated that the attorney told Roberts that she knew of no complaint involving sexual harassment. Based on this affidavit the debtor argued that the Newspaper had knowledge of the falsity of the statements made. While observing that the debtor's evidence "might not be considered substantial," the court found that it was enough to raise a factual issue that was not properly resolved on summary judgment. *Id*. at 929.

At some time following the entry of the order of discharge in the debtor's bankruptcy case, but before the case was closed, the trustee and the Newspaper reached an agreement to settle the defamation litigation. Pursuant to that agreement, the Newspaper's insurance agency was to pay the trustee $10,000, and the case was to be dismissed (Settlement). Notice of the Settlement was given, and the debtor objected. An evidentiary hearing was thereafter conducted by the bankruptcy court.

At the Settlement hearing the trustee did not testify. However, the trustee represented to the court that he had made various inquiries about the lawsuit and had done "some investigation" of it. The trustee also represented that he had also reviewed the appellate court decision, and had concluded that, considering the risks of trial, the Settlement was reasonable.

The trustee's case at the Settlement hearing was presented by counsel for

the Newspaper. The publisher of the Newspaper, Russell Perry, was called to testify. He stated that Roberts had nothing to do with the Newspaper. He also expressed his view, based on what he had been advised by his attorney, that the Lawsuit was without merit. He testified that he had received a series of settlement offers from the debtor in the range of $500,000 to $750,000.

The debtor testified in support of his opposition to the Settlement. He acknowledged that he had not listed the Lawsuit as an asset in his bankruptcy schedules, although he had disclosed its existence in his statement of affairs. He also discussed the Lawsuit at his meeting of creditors. He testified that he believed his damages from the Newspaper exceeded $2 million, and his creditors' claims were in the range of $150,000. He reiterated his story concerning the affidavit of the assistant attorney general. However, he was unable to offer any evidence connecting Roberts to the Newspaper other than the supposed representation of Roberts to the assistant attorney general to the effect that he was with the Newspaper. He also had no evidence to show that Roberts ever told anyone at the Newspaper about his conversation with the assistant attorney general. It appears, however, that the phone call from Roberts to the assistant attorney general may have come after the Newspaper had published its article.[1] The debtor also did not have any evidence to show that Roberts told anyone with the Newspaper about his telephone conversation with the assistant attorney general.

DISCUSSION

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1) because the parties have consented to this Court's jurisdiction and have not opted to have the appeal heard by the United States District Court

[1] The debtor testified that, after Roberts spoke to the assistant attorney general, "he asked her certain questions about the articles in that paper, the features in that paper." (Aplt. App. at 61-62.)

for the District of Wyoming. *Id.* § 158(c); 10th Cir. BAP L.R. 8001-1(a) and (d). The appeal was filed timely by the debtor. *See* FED. R. BANKR. P. 8001-8002. The bankruptcy court's order is final within the meaning of § 158(a)(1) because it " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Cunningham v. Hamilton County*, 119 S.Ct. 1915, 1920 (1999) (quoting *Van Cauwenberghe v. Baird*, 486 U.S. 517, 521-22 (1988)) (further internal quotation omitted)). *See generally American Employers' Ins. Co. v. King Resource Co.*, 556 F.2d 471, 478 (10th Cir. 1977) (reviewing order approving a modified settlement agreement); *C.K. Williams, Inc. v. All Amer. Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997) (reviewing order approving a proposed compromise and settlement). The bankruptcy court's approval of a settlement agreement is reviewable only for an abuse of discretion. *Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989); *Security Nat'l Bank v. Turner (In re Ocobock)*, 608 F.2d 1358, 1360 (10th Cir. 1979).

The debtor is, himself, an attorney. At the Settlement hearing in the bankruptcy court he was represented by counsel. However, he has prosecuted this appeal pro se. In his brief to this Court he advances twelve asserted errors by the bankruptcy court. However, only two of the issues were argued to the bankruptcy court. The remaining issues were never presented to the bankruptcy court for consideration and, having been merely stated but not argued here in any event, cannot be considered. *Diviney v. Nationsbank (In re Diviney)*, 225 B.R. 762, 771 (10th Cir. BAP 1998) ("Issues not raised before the trial court will not ordinarily be considered when raised for the first time on appeal.").

The debtor first argues that the trustee had abandoned any claim to the Lawsuit and, therefore, had no right to settle the suit. This issue was raised in the bankruptcy court and rejected there. The argument is premised on an

assertion that when the order of discharge was entered in the debtor's bankruptcy proceeding the automatic stay terminated and the trustee was, in some manner, stayed from any further participation in the Lawsuit.

The argument of the debtor concerning the abandonment evidences a complete lack of understanding about the effect of the automatic stay. At the Settlement hearing, some stress was placed on the fact that the trustee had never obtained relief from the stay in order to proceed with the Lawsuit. But, of course, the stay bars creditors from enforcing claims **against** the debtor or the estate. It does not stay the prosecution of claims **by** the estate or the trustee. 11 U.S.C. § 362(a); *Nielsen v. Price*, 17 F.3d 1276 (10th Cir. 1994); *Lopez v. Behles (In re American Ready Mix, Inc.),* 14 F.3d 1497 (10th Cir. 1994). Thus the trustee was not required to seek relief from the stay before he undertook to prosecute or settle the Lawsuit.

Neither does the entry of the order of discharge effect an abandonment of any of the assets of the estate. Section 554 of the Code specifies the manner in which assets may be abandoned. The trustee may specifically abandon property that is burdensome after giving notice to the parties in interest. 11 U.S.C. § 554(a). On request of a party, and after notice, the court can order the trustee to abandon property. 11 U.S.C. § 554(b). Property that has been properly scheduled and that is not otherwise administered as of the closing of a case is abandoned to the debtor. 11 U.S.C. § 554(c). None of these circumstances occurred in this case. Because the trustee cannot abandon property except with notice to the creditors, who have an interest in seeing to it that all property is administered, it would be impermissible, and detrimental to the creditors, to find that a trustee could effect an abandonment by his inattention. The debtor's argument that the trustee had, in some manner, abandoned the estate's interest in the Lawsuit is without merit.

The debtor next argues that the bankruptcy court abused its discretion in approving the Settlement under Federal Rules of Bankruptcy Procedure 9019. As set forth above, the standard for this Court's review of this matter has been stated as follows:

> A bankruptcy court's approval of a compromise may be disturbed only when it achieves an unjust result amounting to a clear abuse of discretion. The bankruptcy court's decision to approve the settlement, however, must be an informed one based upon an objective evaluation of developed facts.

Reiss, 881 F.2d at 891-92 (citations omitted).

Our review of the bankruptcy court's approval of the Settlement is hampered in the first instance by the lack of a complete record. There were various exhibits that were introduced and received by the court at the hearing, none of which has been included in the record on appeal. Neither has the debtor seen fit to include in the record any of the bankruptcy schedules, all of the statement of affairs, or any of the pleadings from the underlying litigation. (On the other hand, he has included a purported report from his expert that was never offered nor introduced at trial.) We are unable to tell whether any of these documents were available to the bankruptcy court or were reviewed or relied on by that court. It may well be that there is information in the non-included exhibits that was important to the court in reaching its decision to approve the Settlement. It is the obligation of the appellant to provide this Court with a full and adequate record, failing which the decision of the lower court must be affirmed. *In re Rambo,* 209 B.R. 527 (10th Cir. BAP 1997), *affd. without opinion,* 132 F.2d 43 (10th Cir. 1997); *Berger v. Buck (In re Buck),* 220 B.R. 999, 1005 (10th Cir. BAP 1998) (Without a record of "all of the evidence presented to the bankruptcy court, we cannot determine whether its

decision was not supported by at least minimum credible evidence or bore no rational relationship to the supportive evidence.")

In addition, the record that is available supports the decision of the bankruptcy court. The opinion of the state appellate court makes clear that the plaintiff's burden in a defamation case involving a public figure is severe. The debtor must be prepared to prove, by clear and convincing evidence, that the Newspaper published a false statement with actual malice, knowing the statement to be false or acting with reckless disregard of whether or not it was false. At the Settlement hearing the Newspaper presented the nature of the underlying case and some evidence to support its claim that the published accounts were true. The debtor's attorney represented to the court that the debtor had been ready for trial in the defamation action when the trustee reached the Settlement. Nevertheless, the debtor, who is an attorney himself, was unable to present any evidence to show that the Newspaper published its report with knowledge of its falsity. The only testimony on this issue from the debtor related to the involvement of Roberts, and the debtor was unable to point to any evidence to indicate that Roberts ever had a conversation with the Newspaper about his alleged conversation with the assistant attorney general. (Aplt. App. at 64-66.)

The record reflects that the bankruptcy court properly considered the applicable factors established by *American Employers Ins. Co. v. King Resources Co.*, 556 F.2d 471 (10th Cir. 1977). The record, such as it is, adequately supports the court's findings such that this Court cannot conclude that the approval of the Settlement was an abuse of the discretion accorded the bankruptcy court in these matters.

CONCLUSION

Given the lack of a complete record in this appeal, and the deference that must be accorded the findings and conclusions made by the bankruptcy court, we

conclude that the order of the bankruptcy court approving the proposed Settlement of the state court litigation must be, and is, affirmed.